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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

PAUL S. MIRMAN,

Petitioner,

-v-

THE NEW JERSEY SUPREME COURT AND THE NEW JERSEY BOARD OF BAR EXAMINERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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82 pp

QUESTIONS PRESENTED

I. Is the right to practice law a liberty interest protected by the Fourteenth Amendment.

II. Does due process mandate an inquiry to focus on the applicant's present fitness to practice law.

III. Is petitioner entitled to a hearing before the character commitee with respect to his present fitness to practice law and would such hearing particularly when compared to the liberty interest at stake impose a burden on the State of New Jersey.

IV. Does New Jersey's rule concerning admission of attorneys to its bar unfairly create an irrebutable presumption that deprives otherwise qualified applicants of due process.

V. Can respondents, without affording due process, prevent an attorney disbarred in New York from taking the bar examination in New Jersey when the New York disbarment was based only upon the "preponderance of the evidence" standard whereas the Federal Courts and the State of New Jersey itself require proof by the "clear and convincing evidence" standard.

PARTIES

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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THE NEW JERSEY SUPREME COURT AND THE NEW JERSEY BOARD OF BAR EXAMINERS,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Paul S. Mirman petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit which was entered on April 15, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit entered April 15, 1994 (Appendix A). The opinion of the United States District Court for the District of New Jersey entered on July 21, 1993 (Appendix B).

JURISDICTION

The Court of Appeals entered judgment on April 15, 1994 (Appendix A). This Court has jurisdiction under 28

U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Rules of General Application Section 1:24-2 provides:

> No person shall be admitted to the bar examination unless he first presents to the Board, in the manner prescribed by its rules...
>
> (c) Satisfactory evidence that he is a member in good standing in every other jurisdiction in which he was ever admitted to practice.

STATEMENT OF THE CASE

The important issue raised by this case is whether petitioner's due process rights were violated by the refusal of the New Jersey Board of Bar Examiners to let Paul Mirman take the New Jersey Bar examination without affording even the most cursory due process procedures. The New Jersey Rules of General Application Section 1:24-2 ("the New Jersey rule") which prevents an applicant from taking the New Jersey bar examination unless at the time he is a member in every other jurisdiction he was ever admitted is unconstitutional on its face and as applied to petitioner.

Paul Mirman received his Juris Doctorate from Brooklyn Law School in 1969 and was admitted to the practice of law in the State of New York in 1971. He worked at insurance and insurance defense firms for approximately two years and then joined the Plaintiff's personal injury firm of Cooper and Mulberger in 1971. He became head of that practice in 1973 and continued as a sole practitioner through 1979. Starting in 1980, he headed a busy growing Plaintiff's personal injury firm of four full time attorneys which grew into a firm of twelve attorneys by 1991.

Mr. Mirman was disbarred from the practice of law in the State of New York on May 20, 1991, *Matter of Mirman,* 569 N.Y.S.2d 981, 167 A.D.2d 60, *appeal dismissed* 576 N.Y.S.2d 210, 582 N.E.2d 593 (1991) *cert denied,* _ U.S. _, 112 S. Ct. 1561(1992).

While the disbarment occurred in 1991, the incidents underlying disbarment involve eight cases out of approximately 10,000 cases that were said to be mishandled by others in his firm which occurred in the early 1980s, none occurred after 1983. Mr. Mirman's honesty and moral character were never even remotely called into question by the charges against him as related by the Appellate Division. The charges related solely to the purported

negligent handling of eight cases in the early 1980s.

Mr. Mirman hired his first associate in 1979 and then in 1980 he hired three additional associates. The firm kept track of its cases by maintaining diaries, utilizing calendar services available in the various Courts of New York, regular file reviews and a system of review sheets and work sheets wherein the attorneys were required to mark each file at the completion of the task assigned. By 1980, the firm had over 2,000 active files.

In December of 1980 while coping with a burgeoning case load, Mr. Mirman was hospitalized with Guillain-Barre Syndrome. From December 1980 through February 1981, Mr. Mirman was paralyzed and confined to the hospital. Upon his release from the hospital in late February 1981, he was confined to home and unable to work until late spring of 1981. Commencing July 1981 through September 1981, he gradually recommenced working, albeit, on a limited basis, gradually increasing his work load while regaining his strength. By September of 1981, Mr. Mirman was finally able to work on a full time basis.

During Mr. Mirman's illness an associate assumed responsibility for managing the office. Two of the charges upon which the New York Appellate Division eventually disbarred Mr. Mirman involved occurrences while Mr. Mirman was out ill with Guillain-Barre disease. The Court is respectfully referred to the affidavit of Paul S. Mirman (Appendix C).

Throughout the 1980's, the firm expanded rapidly. New associates were hired, the management system was computerized and strenuous efforts were conducted to ensure the efficient prosecution of the extraordinary and ever growing caseload. By 1991 there were twelve attorneys.

During the entire period of Mr. Mirman's practice from 1973 through 1991, the year of his disbarment, the Appellate Division was only able to identify eight incidents

of law office error despite thousands of cases successfully handled by Mr. Mirman. As can be seen from Mr. Mirman's affidavit and the decision of the Appellate Division, Mr. Mirman himself was never involved in the actual mishandling of the case but rather, it was an associate that had inadvertently erred. Significantly not one of the charges involved Mr. Mirman's practice from 1984 and onward.

The disbarment proceedings relied upon eight charges against Mr. Mirman in the purported mishandling of eight cases in twenty years of practice. None of the eight charges even remotely alleged so much as a scintilla of fraudulent, criminal or intentional conduct. The eight charges were merely eight incidents of purported law office errors.

In each of the eight cases relied on by the New York Appellate Division, Mr. Mirman attempted, where possible, to repair any injury that had been caused by the office's mistakes. In three cases, he successfully obtained recoveries satisfactory to his clients, either by reinstatement of the claims, or through a different forum. (Charges 1, 2 and 8). In two others, when he could not remedy the situation, he advised the clients to seek separate counsel to bring a malpractice claim against him -- both of which he settled out of court. (Charges 3 and 5).

In the three remaining claims, no action could be taken by him, because the clients abandoned or decided not to pursue the claims for which they had retained him. In one, the client left the country. (Charge 6). In another, the client was unavailable for an inquest, and was never heard from again. (Charge 4). In the last, the client never sought to pursue the matter once it was dismissed; nor did he file a complaint. (Charge 7).

The referee conducting the hearing with respect to the eight charges sustained only five of the eight charges, namely 1, 3, 5, 6 and 8. All of the charges sustained by the referee were based only upon a preponderance of the evidence. Copies of the relevant portions of the referee's

report which spans 153 pages are annexed hereto (Appendix D). Three of the charges, namely 2, 4 and 7, were not proven even by the lesser standard of a preponderance of the evidence.

It is clear beyond any doubt that the referee's findings were based upon the erroneous and unconstitutional New York standard which has been rejected by the Federal Courts, the overwhelming majority of states and the State of New Jersey itself.

The Appellate Division of the State of New York went on to affirm even charges 2, 4 and 7 which the referee after an exhaustive hearing and 153 page report, determined were not proven by even a preponderance of the evidence.

After Mr. Mirman's disbarment in 1991, he submitted an application to the New Jersey Board of Bar Examiners for admission to practice as an attorney in the State of New Jersey. The application was accepted and Mr. Mirman sat for the New Jersey Bar Examination on February 1992. He was unable to complete the essay portion of the bar examination due to a physical impairment, a consequence of his neuorological disease, inhibiting his ability to physically write the answers to the essay questions. Although he had requested an electronic recording device to dictate the answers, said request was denied.

On or about May of 1992, Mr. Mirman re-applied to sit for the New Jersey Bar Examination. This time, the application was denied on the basis that Mr. Mirman was unable to procure a certificate of good standing from every jursidiction in which he was ever admitted, pursuant to New Jersey Rules of General Application Section 1:24-2.

An action was commenced against the New Jersey Supreme Court and the New Jersey Board of Bar Examiners . Respondents moved to dismiss petitioner's complaint arguing that Plaintiff did not have a property interest to practice law in the State of New Jersey and that, therefore, the right to take the bar examination was not

protected by the due process clause of the Fourteenth Amendment. Respondents further argued that the proceedings that took place in New York satisfied due process under the Fourteenth Amendment.

Petitioner cross-moved for summary judgment on the ground that even if a property intertest was not present, petitioner had a genuine "liberty" interest to practice law in the State of New Jersey and was, therefore, entitled to due process. Petitioner also argued that the hearing in New York was not res judicata as to his application to the bar in New Jersey since he was entitled to due process with respect to his application for admission in the State of New Jersey based on his present fitness to practice.

By Order of the Honorable Maryann Trump Barry entered on July 21, 1993, Defendant's motion for dismissal was granted and Plaintiff's cross-motion for summary judgment was denied.

The District Court refused to recognize a liberty interest at stake and held that the New Jersey rule did not violate a liberty interest interest.

The Order of the District Court was appealed to the United States Court of Appeals for the Third Circuit which affirmed the District Court's decision without an opinion.

REASONS FOR GRANTING THE PETITION

I. THE PRACTICE OF LAW IS A LIBERTY INTEREST WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT AND, THEREFORE, AN APPLICANT TO THE BAR OF THE STATE OF NEW JERSEY IS ENTITLED TO DUE PROCESS AS A MATTER OF LAW

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796 (1956).

"[The] requirements of procedural due process must be met before a State can exclude a person from practicing law". *Willner v. Committee of Character and Fitness,* 373 U.S. 102, 83 S.Ct. 1175 (1963).

The term "liberty" within the meaning of the Fourteenth Amendment

> Denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, to establish a home and to bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those prvileges long ago recognized . . . as essential to the orderly pursuit of happiness by free men. [Emphasis added.] *Meyer v. Nebraska,* 262 U.S. 390 (1990).

"In a constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed". *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701 (1972).

The right to pursue one's profession including the practice of law, is a fundamental "liberty" within the meaning of the due process clause of the Fourteenth Amendment. *Schware, supra; Willner, supra; Roth, supra; Meyer v. Nebraska, supra; Greene v. McElroy,* 360 U.S. 474, 79 S.Ct. 1400 (1960); *In re Summers,* 325 U.S. 501, 65 S. Ct. 1307 (1945); *Ludtke v. Kuhn*, 461 F. Supp. (SDNY 1978); *Whitaker v. Board of Higher Education of the City of New York*, 461 F. Supp 99 (EDNY 1978).

This Court in *Roth* vigorously affirmed its ruling in *Schware* and *Willner,* holding that denial of due process to an individual seeking admission to practice law is an absolute violation of a "liberty" interest within the meaning of the due process clause of the Fourteenth Amendment. *Roth,* 408 U.S 564, 574.

In *Roth,* the Respondent, after having taught for one year at Wisconsin State University was not rehired. There was no explanation or a hearing. Roth contended that his right to due process was violated. This Court painstakingly defined "liberty" within the meaning of the due process clause of the Fourteenth Amendment as applied to an individual engaged in the pursuit of his or her chosen profession by delineating those circumstances where a "liberty" interest existed. The Court determined a "liberty" interest would exist if "in declining to reemploy the Respondent [it] imposed on him a stigma or other disability *that foreclosed his freedom to take advantage of other employment opportunities.* The State, for example, did not invoke any regulations to bar the Respondent from all other public employment in State Universities. For had it done so, this, again, would be a different case. For to be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . ." [emphasis added.] *Roth* at 573-574.

Simply put, a *liberty interest* exists and is violated where the action of the State absolutely forecloses the individual's right to pursue the profession of his or her

choice.

In *Roth,* this Court, dwelt a great deal on examination of the record to determine whether or not the Respondent had been foreclosed from pursuing his teaching career in the rest of the State. The Court determined from the record that the failure of the State University of Wisconsin to rehire *Roth* did not in any way foreclose his ability to pursue his teaching profession in other colleges and universities in the State. However, had the converse been true, i.e., that as a result of the State's action, he would have been banished from the teaching profession in the State of Wisconsin, then a *liberty interest* would have been present requiring due process.

The definition of "liberty" was repeatedly impressed the in *Roth.* The Court in reviewing the record noted that "there is no suggestion of how non retention might affect the Respondent's future employment prospects. The mere proof for example, that his record of non retention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the conduct foreclosure of opportunities amounting to a deprivation of "liberty". *Roth* at 574, n.13. The Court further stated "it stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as *free as before to seek another".* [emphasis added] *Roth* at 575.

Thus, the test for determining when a liberty interest is involved with respect to an individual engaged in the pursuit of a profession is whether or not the action will *totally foreclose* the individual from pursuit of his chosen profession. Obviously, New Jersey's refusal to permit Paul Mirman to sit for the New Jersey bar examination *absolutely precludes* Mr. Mirman from practicing law in the entire State of New Jersey. Therefore, a *liberty interest* is clearly present.

The lower Courts here refused recognize that a liberty interest was implicated since "numerous Courts,

including this Court, have held that the application of general prerequisites for admission to the bar does not implicate any liberty interest of a potential applicant", citing to *Potter v. New Jersey Supreme Court,* 403 F.Supp 1036 (D.N.J. 1975) and *Ostroff v. New Jersey Supreme Court,* 15 F.Supp 326 (D.N.J. 1976). The District Court committed reversible error by failing properly apply the liberty interest definition so carefully delineated in *Roth,* thereby failing to recognize a crucial distinction.

Both *Potter* and *Ostroff* fail to fit into the *Roth* definition of a liberty interest since the applicant in each case was not foreclosed from pursuing his profession: In *Potter,* the Plaintiff was not permitted to sit for the bar examination because he did not graduate from an accredited college; in *Ostroff* because he did not graduate from an accredited law school. This did not bar them from choosing to obtain the appropriate degrees from accredited institutions and then applying for bar admission. Their field of opportunity was by no means foreclosed; accordingly, their liberty interest was not at stake.

Potter and *Ostroff* do not stand for the proposition that regulations concerning bar admission do not implicate a liberty interest. There obviously are regulations that are unconstitutional, e.g., *In re Griffiths,* 413 U.S. 717 (1973). (Citizen requirement is unconstitutional.), *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985) (excluding non residents of the State is unconstitutional).

New Jersey's requirement that Mr. Mirman produce a certificate of good standing has absolutely foreclosed Mr. Mirman's opportunity to practice law in the entire State of New Jersey. This is not a regulation that can be overcome by the candidate's free will choice to comply with the requirement as in *Potter* and *Ostroff.* Accordingly, a liberty interest is concerned, thereby invoking the due process clause of the Fourteenth Amendment.

II. THE INQUIRY MUST FOCUS ON THE APPLICANT'S PRESENT FITNESS TO PRACTICE LAW

The New York disbarment was precipitated by incidents that had occurred more than ten years ago while Mr. Mirman was hospitalized with Guillain-Barre Syndrome, a neurological disease, and was rendered incapacitated from controlling the affairs of his practice for practically a year.

The eight charges of law office error that resulted in Mr. Mirman's disbarment only concerned his handling of eight cases from 1980 to 1984. During that period of rapid growth, Mr. Mirman had continuously implemented new systems and hired additional staff to control the burgeoning case load.

Over more than twenty years of practice, the Appellate Division could only cite to eight cases out of thousands upon thousands of cases that were prosecuted to a successful conclusion. The number of cases in which errors were found amount to a miniscule percentage of the entire caseload. Moreover, the purported errors were not committed by Mr. Mirman himself but rather by employees of the office. Significantly, from 1984 and onward there is not one charge of an error despite thousands of cases prosecuted by Mr. Mirman. This attests to the remarkable rehabilitation of Mr. Mirman's practice and the genuine good faith effort to reform.

The charges resulting in the ultimate disbarment of Mr. Mirman do not in any way reflect upon his present fitness to practice law.

It is well established that due process obligates a consideration of the applicant's *present fitness* and ability to

practice law. *Schaware, supra; Theard, supra; In re Ashton,* 768 F.2d 74 (3rd Circuit 1975); *In re Braverman,* 549 F.2d 913 (4th Circuit 1976).

In *Schware, supra;* this Court repeatedly emphasized the *present fitness* of the petitioner to practice law. The Court noted "there is nothing in the record which suggests that Schware has engaged in any conduct during the past fifteen years which reflects adversely on his character. The New Mexico Supreme Court recognized that "he presently enjoys good repute among his teachers, his fellow students and associates and his synagogue". *Schware* at 239.

The Court further noted with respect to his prior arrests that "it should be emphasized that these arrests were made more than twenty years ago . . . " *Id* at 242.

With respect to Schware's affiliation to the communist party, the Court noted "there is no such suggestion that Schware was affiliated with the communist party after 1940-more than fifteen years ago". *Id* at 246.

With respect to his use of an alias, the Court noted that "the use of an assumed name many years ago and membership in the communist party during the 1930s - cannot be said to raise substantial doubts about *his present good and moral character"* [emphasis added] Id at 246.

Similarly, in *Theard, supra,* this Court noted that the activity for which Theard had initially been disbarred by the State Court had occurred many years before and during a period where he was under a disability. Therefore, the District Court did not subsequently have the right to strike him from the roll of attorneys without according due process.

In *Ashton, supra,* an attorney was convicted on December 30, 1974 in the District Court for two counts of mail fraud. The conviction resulted in Ashton's suspension from the Pennsylvania Bar. Ashton served time in a Federal penitentiary and paid a fine.

Thereafter, he enrolled in alcoholics anonymous and

after a lengthy period of rehabilitation applied for readmission to the Pennsylvania Bar. A two day hearing was conducted at which time the Disciplinary Board recommended to the Supreme Court that Ashton be readmitted because of his conduct while suspended and his recovery from alcohol abuse. On October 16, 1982, just eight years after his conviction, Ashley was reinstated to the Pennsylvania Bar. After his readmission to the Pennsylvania Bar, Ashton applied for admission to the District Court. An ad hoc panel was appointed by the District Court which reviewed the report submitted by the Pennsylvania Disciplinary Board to the Supreme Court and the four hundred thirty three transcript of proceedings before that board.

The panel filed a report concluding that the Pennsylvania reinstatement hearing "did not establish that Ashton is of good moral and professional character" and recommended that his application for admission to the District Court be denied.

The District Court conducted a hearing at which Ashton presented character witnesses as to his present fitness to practice law. However, the District Court without notice had challenged Ashton with respect to conduct *prior* to the time of his conviction of mail fraud which he was not apprised of before the hearing and for which he had no opportunity to respond. Those complaints did not bear upon Ashton's present and moral character.

Despite testimony with respect to his present character, the District Court declined to admit Mr. Ashton. The Third Circuit reversed holding that on the record "Ashton established a *prima facie* case *of present good character"* [emphasis added] *Ashton* at 81. The Third Circuit held that the District Court was restricted to reviewing Ashton's present moral character and fitness to practice law. The District Court's focus on his prior conduct without consideration of his rehabilitation and present fitness to practice law was a gross violation of

Ashton's due process rights.

As an aside, Ashton also supports petitioner's position that an attorney applying for admission for the practice of law must be accorded due process.

Ashton was a convict who had served time in a Federal penitentiary and yet he was admitted to practice law only eight years after his conviction on the basis of his present fitness to practice.

Similarly, in *In Re Dreir,* 258 F.2d 68 (3rd Cir. 1958), the Third Circuit itself mandated a consideration of present fitness stating that "we think the Court erred in giving controlling weight to the appellant's previous convictions and little or no weight to the evidence of his subsequent rehabilitation and present good moral character". Mr. Mirman has never been convicted of anything and has never spent any time in prison. Not one of the charges brought by the Appellate Division even remotely hint to any criminal conduct or impinge upon his moral character. The charges resulted solely from law office error in eight cases. Respondents' insistence to deny Mr. Mirman due process for actions or rather inactions that occurred more than a decade ago is patently contrary to the direction of this Court which obligates the Board of Bar Examiners to consider the applicant's *present* fitness to practice law. See also *in Re Braverman,* 545 F.2d 913 (4th Circuit 1976).

The lower Courts committed error by failing to adhere to Supreme Court precedent with respect to the focus of the inquiry as to attorney qualification as well as the clear precedent of the Third Circuit itself.

III. BALANCING THE EQUITIES, DUE PROCESS REQUIRES THAT THE PETITIONER BE GIVEN A HEARING CONCERNING HIS PRESENT FITNESS TO PRACTICE LAW SINCE THE LIBERTY INTEREST AT STAKEIS GREAT AND THE IMPOSITION ON NEW JERSEY'S ADMINISTRATIVE AND FISCAL RESOURCES IS MINISCULE

"An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case". *Cleveland Board of Education v. Loudermill,* 470 U.S. 532(1985). Having established that plaintiff possesses a protected liberty interest, which was violated, the remaining question is what due process procedure plaintiff is entitled to. Plaintiff is entitled to the same due process procedure as any other applicant, to wit, review by New Jersey's character committee. Balancing Mr. Mirman's guaranteed liberty interest against any purported imposition upon New Jersey's resources in accordance with the balancing test formulated by the Supreme Court in *Loudermill, supra,* unequivocally mandates a hearing before the character committee.

(i) A PRIVATE INTEREST IS AFFECTED

The private interest in pursuing the profession for which one was educated and trained is certainly great, certainly as great as the private interest in being deprived of a means of livelihood. *Loudermill, supra.* Mr. Mirman as a result of the State's action will not be able to practice law in the State of New Jersey at all.

(ii) THE GOVERNMENT INTEREST WILL STILL BE SERVED AND THE FISCAL AND ADMINISTRATIVE BURDEN IMPOSED UPON NEW JERSEY IS PRACTICALLY NILL

New Jersey already has a well established extensive functioning aparatus for screening thousands of bar applicants every year. Rule 1:25 of the New Jersey Rules of General Application provides:

> The Supreme Court shall appoint a committee on character comprised of such number of attorneys as it may determine. It shall be the duty of the committee to determine the fitness to practice law of each candidate for admission to the bar of the State of New Jersey on the basis of and by reviewing the personal record and reputation of each candidate and, following such, to certify as to such fitness to the Supreme Court or withold such certification.

Thus, the State of New Jersey does not have to undergo the slightest additional effort to accord Mr. Mirman a fair hearing. The mechanics for processing thousands of candidates every year is in place. Simply processing one more application will not incur any noticable fiscal or administrative burden.

Further, New Jersey's interest in only admitting applicants with a present fitness to practice law will still be served and will not be undermined by affording a hearing to determine such fitness. Indeed it appears that New Jersey's interest will greatly be served. First, any legal body, especially the legal profession out of all professions, has a

vested interest in following minimum due process requirements so as to set an example for all others to follow. Second, merely providing a hearing to an applicant does not mean that *all* applicants who are no longer members of other bars, regardless of fitness, are automatically admitted; rather, it simply means there will be a due process hearing to determine present fitness, rather than an indiscriminate irrational rejection based upon a false criteria.

Given that there will be a determination of present moral character and fitness which is New Jersey's sole interest, in an already existing format, there is no question that New Jersey's interest is decidedly outweighed by the private interest involved and the very great risk of an erroneous determination by not providing a hearing.

(iii) FAILURE TO ACCORD DUE PROCESS GREATLY RISKS AN ERRONEOUS DETERMINATION HERE

The indiscriminate application of the subject New Jersey provision does not simply risk here an erroneous determination, but rather guarantees one. Simply because an applicant is not still a member in good standing of each bar he ever belonged to does not automatically mean that the applicant is presently unfit to practice law. For example, an attorney admitted to practice in New York may decide to resign from practice in New York because he no longer wishes to practice there. This applicant will be unable to produce satisfactory evidence that he is a member in good standing, despite his fitness to practice.

Similarly, an attorney who was suspended or disbarred in New York and is qualified for reinstatement but choses not to be reinstated will not be capable of producing satisfactory evidence that he is a member of good standing despite his fitness to practice.

The New Jersey regulation also risks an erroneous

determination vis-a-vis applicants who may have been disbarred or suspended in other jurisdictions for conduct which under New Jersey law would warrant a far lighter penalty.

The case at bar is a primary example. While Mr. Mirman was disbarred in New York three and one half years ago due solely to mishandling eight cases over ten years ago in twenty years of practice, attorneys in New Jersey guilty of the same or far more egregious conduct, including outright misrepresentation and forgery have been given far lighter penalties. In *Matter of Goore,* 127 N.J. 246, 604 A.2d 88 (1992) failure to communicate with clients, lack of due diligence, failure to keep records for seven years, gross neglect, failure to supervise an assistant, failure to cooperate with the ethics authorities resulted in a three month suspension. In *Matter of Alterman,* 126 N.J. 410, 599 A.2d 515 (1991) gross neglect, lack of diligence, misrepresentations, callous disregard for clients' interests, deceitful conduct, practicing while ineligible, failing to cooperate with ethics authorities, resulted in a two year suspension. In *Matter of Marlowe,* 121 N.J. 236, 579 A.2d 308 (1990) gross neglect, pattern of neglect, misrepresentation to client resulted in a three month suspension and $500 sanction. In *Matter of Ashley,* 122 N.J. 52, 583 A.2d 1122 (1991) neglect of ten client matters, refusal to return files, forging client's signatures on bankruptcy petitions without their knowledge resulted in a two year suspension. In *Matter of Kasdan,* 115 N.J. 472, 559 A.2d 411 (1989) fabrication of trial dates, preparation of false pleadings, intentional misrepresentation to clients, issuance of trust account check against insufficient funds resulted in a three month suspension followed by two year proctorship. In *Matter of Ruddy,* 130 N.J. 85, 612 A.2d 949 (1992) a guilty plea to four counts of endangering the welfare of child resulting in a two year suspension.

It is clear that New Jersey has consistently imposed far lighter penalties for significantly greater infractions.

Automatically barring an applicant for the failure to produce evidence of bar membership clearly results in the erroneous denial of an otherwise qualified applicant.

IV. THE NEW JERSEY RULE CREATES AN IRREBUTTABLE PRESUMPTION THAT IS REPUGNANT TO DUE PROCESS

This Court has consistently stricken statutes that unfairly create irrebuttable presumptions about an individual's competence or character, holding that such statutes undermine constitutional guarantees of due process and equal protection. Here, the New Jersey rule impermissibly creates such an unconstitutional presumption, namely that *all* disbarred lawyers are *presently* unfit while the entire thrust of the bar's inquiry is on present fitness of a candidate.

In *Stanley v. Illinois*, 92 S.Ct. 1208, 405 U.S.645 (Sup. Ct. 1972), plaintiff challenged an Illinois statute providing that children of unmarried fathers, upon the death of the mother were declared dependents of the State without a hearing on parental fitness and without proof of neglect. This Court held that the statute was unconstitutional stating that:

> ". . . [A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley equal protection of the laws guaranteed by the Fourteenth Amendment."

The Court further stated that "[i]t may be, as the State insists that *most* unmarried fathers are unsuitable and neglectful parents . . . [but] all unmarried fathers are not in

this category; some are wholly suited to have custody of their children." The Court held that "[g]iven the opportunity to make his case, Stanley may have been seen to be deserving custody of his offspring".

The case at bar is indistinguishable from *Stanley*. The subject New Jersey rule, as Respondent explicitly concedes, was created to "exclude many unfit applicants". However, because one is no longer a bar member in one state, does not mean he is automatically presently unfit to practice law in New Jersey. While the New Jersey rule may weed out some unfit applicants, as the provision in *Stanley* does, it deprives suitable applicants of due process.

In *Stanley,* the State argued, as Respondent argues here, that State administrative and fiscal considerations outweigh any isolated instances of depriviation of constitutional rights. The Court rejected this: "the constitution recognizes a higher value than speed and efficiency". *Stanley* at 1215.

It might be easier for the State to form a presumption of fitness on the basis of membership in other State bars, but that does not validate the procedure. "Procedure by presumption is always cheaper and easier than individualized determination". *Stanley* at 1215.

Particularly, where bar admission is concerned and there is an existing mechanism to screen candidates resulting in minimal imposition on fiscal and administrative resources as discussed, *supra,* a statute that creates overbroad presumptions in the purported interest of fiscal and administrative expediency is patently egregious.

This Court's analysis in *Stanley* has been adopted in a long line of cases:

In *Cleveland Board of Education v. LaFleur,* 94 S.Ct. 791, 414 U.S.632 (1974), the Plaintiff school teacher challenged the constitutionality of mandatory maternity leave rules of Cleveland, Ohio and Chesterfield County, Virginia school boards. The issue before the Supreme Court was whether the rules were overbroad and thereby violative

of due process. This Court answered in the affirmative stating that "the provisions amount to the conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing". *LaFleur* at 798. The Court went on to state

> "The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.
>
> As the Court noted last term in *Vlandis v. Kline,* 412 U.S. 441, 446, 93 S.Ct. 2230, 2233, 37 L.E.263, permanent irrebutable presumptions have long been disfavored under the Due Process clause of the Fifth and Fourteenth Amendments."

In *LaFleur* as in *Stanley,* and as in the case at bar, the Defendant argued administrative expediency. However, the Supreme Court held that

> "Adminstrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon based on constitutional liberty in support of their legitimate goals." Id. at 800.

The rejection of statutes creating irrebuttable presumptions in the purported interest of expediency has been vigorously followed in a line of Supreme Court cases. See *Vlandis v. Kline,* 93 S.Ct. 2230, 412 U.S. 520 (1973); *Bell v. Burson,* 91 S.Ct. 1586, 402 U.S. 535 (1971); *Carrington v. Rash,* 85 S.Ct. 775, 380 U.S. 89 (1965).

The rejection of indiscriminate state regulations that create overbroad sweeping irrebutable presumptions has

been applied with equal vigor to the statutory schemes concerning bar admissions.

In *In re Manville,* 538 A.2d 1128 (D.C. App. 1988), Manville, a bar applicant, had plead guilty to voluntary manslaughter. In considering his application to the bar, the Court, relying upon the principles espoused by this Court in *LaFleur, supra; Vlandis, supra; and Stanley; supra,* stated:

> "As we noted in *Manville I,* all other jurisdictions of which we are aware have eschewed a *per se* rule of exclusion for previously convicted felons, opting instead for case-by-case determinations of whether the applicant, as of the time of the application, has the good moral character necessary for admission to the bar."

The Court in *Manville* rejected per se rules for disqualifying bar candidates based upon *Schware, supra,* which case mandates a consideration of the applicant's *present fitness.* While past conduct does play a role in the consideration, as the Court noted in *Manville,* it is by no means is the *sole* determinative factor, rather, the focus is centered upon the applicant's *present fit-ness.*

In *In re Watts,* 557 A.D.2d 601 (D.C. App. 1989), the applicant had been convicted of two felonies. The bar committee in fact conducted an investigation and declined to recommend his admission to the bar. The Court remanded the application for further review on the ground that the committee failed to fully consider the applicant's demonstration of reform and present fitness to practice.

The Third Circuit itself has expressly eschewed sweeping per se rules based on past errors. *In re Dreier, supra,* the applicant had been convicted of bribery and fraudulent conversion while serving as Mayor of Nanticoke. The applicant sought admission to the District Court and was denied admission on the basis of his past conduct. Based on *Schware,* the Court remanded the matter back to the District Court and directed a consideration of

the applicant's subsequent rehabilitation and present good character.

The uncontrovertible emphasis placed on a bar applicant's present fitness in conjunction with a rejection of per se statutes creating irrebuttable presumptions are inconsistent with the subject New Jersey statute.

The New Jersey rule creates an irrebuttable presumption of

present unfitness to practice law. It absolutely denies admission to an applicant who can demonstrate present fitness to practice although the present fitness of the applicant is central to the inquiry.

It further absolutely denies admission to otherwise qualified applicants who have chosen to resign from other state bars or who are qualified for reinstatement but choose not to be reinstated. Such individuals will not be able to satisfy the New Jersey rule despite their qualification to practice.

Thus on its face, the New Jersey rule creates an overbroad per se rejection of anyone who is presently not a member of a bar he at one time been admitted which unfairly and irrationally denies admission of qualified appiicants.

The New Jersey rule is unconstitutionally overbroad on its face given the unfair and untrue presumption it creates which is acutely manifest in its instant application to the petitioner herein.

V. MR. MIRMAN'S HEARING IN NEW YORK DID NOT SATISFY THE CONSTITUTIONAL STANDARD OF REVIEW WITH RESPECT TO THE QUALIFICATION OF ATTORNEYS TO PRACTICE LAW

Respondent's position that the disbarment proceedings in New York afforded Mr. Mirman the opportunity for a just and fair hearing with respect to his fitness to practice law is incorrect as a matter of law.

New Jersey cannot rely upon the New York determination in denying admission since the New York standard of review for disqualifying attorneys, to wit, a preponderance of the evidence, (*In the Matter of Capoccia,* 446 N.Y.S.2d 268, 453 N.E.2d 497 (Ct. of App. 1983), is unconstitutional: it violates due process and has been expressly rejected by the Federal Courts and the overwhelming majority of State Courts, including the State of New Jersey itself which all require proof by "clear and convincing evidence".

In re Medrano, 965 F.2d 101 (5th Cir. 1992), the United States Court of Appeals for the Fifth Circuit reversed disbarment where the "fair preponderance of the evidence" standard was used holding that disbarments must be supported by the significantly more exacting standard of "clear and convincing evidence", to satisfy constitutional guarantees of due process.

In *Medrano,* the Court said:

> "A disbarment proceeding is adversarial andquasi-criminal in nature and the moving party bears the burden of proving all elements of a violation. *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *Matter of Thalheim,* 853 F.2d 383 (5th Cir. 1988). The notice of the allegations and the disbarment proceeding must satisfy the requirements of procedural due process.

> *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990). *A Federal Court may disbar an attorney only upon presentation of clear and convincing evidence* sufficient to support the finding of one or more violations warranting this extreme sanction. *NASCO, supra.* [emphasis added]

In *In re Fisher,* 179 F.2d 361 (7th Cir. 1950), cert. denied U.S. 1951), the Seventh Circuit, noting the severe consequence of a disbarment upon an attorney's ability to earn a living stated:

> This duty has proof of sufficient proof for disbarment repeatedly been declared by this Court. *Chicago Bar Association v. Lotterman,* 353 Ill, 399, 187 N.E. 811; *People ex rel. Chicago Bar Association v. Hansen,* 316 Ill. 502, 147 N.E. 431. Such duty, and the manner in which it is exercised, *must be sustained by clear and convincing proof and the misconduct must be shown to have been fraudulent and the result of improper motives, and the proof must show intent.* [emphasis added.]

The clear and convincing evidence standard has been repeatedly enforced by the Federal Courts. See *In the Matter of Thalheim,* 853 F.2d 383 (5th Cir. 1988); *In re Rider,* 263 F.Supp. 360 (E.D. Virginia 1967, aff'd 381 F.2d 713 (4th Cir. 1967); *In re Levine,* 675 F.Supp. 1312 (U.S.D.C. Florida 1986); *New England Insurance Company v. Sylvia,* 783 F.Supp. 6 (D. New Hampshire 1991).

New Jersey itself has consistently enforced the clear and convincing standard in disbarment proceedings. See *The Matter of Rogers,* 599 A.2d 141 (N.J. 1991); *The Matter of Konopaca,* 596 A.2d 773 (N.J. 1991); *The Matter of Shaw,* 443 A.2d 670 (N.J. 1982); *The Matter of Sears,* 364 A.2d 777 (N.J. 1976); *In re Rockoff,* 331 A.2d 609

(N.J. 1975); *The Matter of Gross*, 341 A.2d 336 (N.J. 1975).

There are only six states, including New York, in the entire country that still cling to a preponderance of the evidence standard. The rest of the states impose a significantly greater burden and nearly half, including the State of New Jersey require that disbarment be by clear and convincing evidence (Appendix E -listing compiled by the National Organization of Bar Counsel).

The disbarment proceedings in New York relied upon eight incidents of purported law office errors during twenty years of practice. None of the eight charges alleged fraudulent, criminal or intentional conduct. The referee conducting the hearing with respect to the eight charges sustained only five of these and these were sustained only by the erroneous and unconstitutional "fair preponderance of the evidence" standard.

The Appellate Division of the State of New York upheld all the charges including those the referee determined were *not* proven by even a preponderance of the evidence after an exhaustive hearing and 153 page report. See *Matter of Mirman, supra.*

It is crystal clear that the eight charges brought against Mr. Mirman were not supported by clear and convincing evidence. The referee himself found that three of the eight charges were not even supported by a fair preponderance of the evidence; a fortiori, those three charges could not be supported by the more exacting standard of clear and convincing evidence.

Thus, Mr. Mirman was denied constitutional guarantees of due process by New York's failure to adhere to the constitutionally mandated standard of review, to wit, clear and convincing evidence. Respondents wrongfully relied upon New York's determination with respect to Mr. Mirman's fitness to practice law, a standard the State of New Jersey itself has expressly rejected.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Respectfully submitted,

Paul S. Mirman
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222 Baltic Street
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June 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5497

PAUL S. MIRMAN,

Appellant

v.

THE NEW JERSEY SUPREME COURT;
THE NEW JERSEY BOARD OF BAR EXAMINERS

Submitted December 29, 1993

BEFORE: STAPLETON, HUTCHINSON and ROTH,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court entered July 21, 1993, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

_____

Circuit Judge

ATTEST:

_____

Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PAUL S. MIRMAN, Pro Se,
Plaintiff,

vs.

THE NEW JERSEY SUPREME COURT and THE NEW JERSEY BOARD OF BAR EXAMINERS,
Defendants.

Civil Action No. 92-5176 (MTB)

ORDER

This matter having come before the court upon the motion of defendants to dismiss the claim of plaintiff Paul S. Mirman for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), and upon the cross-motion of plaintiff for summary judgment, pursuant to Fed. R. Civ. P. 56(c); and the court having considered the submissions of the parties both in support of and in opposition to the motions without oral argument, pursuant to Fed. R. Civ. P. 78; and

it appearing that on or about May 20, 1990, plaintiff was disbarred by Order of the Appellate Division of the State of New York, Second Department; Complaint ¶ 8; and

it appearing that in May, 1992, plaintiff applied to defendants to take the New Jersey bar examination in order to be admitted to practice law before the courts of the State of New Jersey; Complaint ¶ 18; and

it appearing that the New Jersey Rules of General Application provide that no person shall be admitted to the bar examination unless he or she presents to the Board of Bar Examiners (1) evidence that he or she is over 18 years

of age; (2) a certification indicating that he or she has been awarded a Bachelor of Laws degree or its equivalent from an American Bar Association accredited law school; and (3) "[s]atisfactory evidence that he is a member of the bar in good standing in every other jurisdiction in which he was ever admitted to practice"; N.J. R. 1:24-2; and

it appearing that in May, 1992, defendants rejected plaintiff's application to take the New Jersey bar examination because plaintiff could not produce a certificate of good standing from the Bar of the State of New York; Complaint ¶ 21; and

it appearing that plaintiff was notified that he was ineligible for admission to the Bar of the State of New Jersey; Complaint ¶ 20; and

it appearing that in his complaint, plaintiff maintains that defendants' refusal to allow him to apply for admission to the Bar of the State of New Jersey was "unreasonable, arbitrary and capricious," thereby violating his rights under the Fourteenth Amendment of the United States Constitution; Complaint ¶ 24; and

it appearing that defendants now move to dismiss the complaint, contending that plaintiff has failed to assert a claim upon which relief can be granted; and

it being the opinion of the court that a complaint should be dismissed for failure to state a claim upon which relief can be granted "if it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief"; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (Quoted in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976)); *see also O'Boyle v. Jiffy Lube International, Inc.*, 866 F.2d 88, 93 (3d Cir. 1989); *Paolino v. Channel Home Centers*, 668 F.2d 721, 722 (3d Cir. 1981); and

it being the opinion of the court that although plaintiff's complaint and briefs use the terms "equal protection" and "procedural due process" indiscriminately,

the concepts are distinct, and it is clear that the gravamen of plaintiff's complaint is that he was not afforded adequate process;[1] and

it being the opinion of the court that the protections of procedural due process "apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property" and that, therefore, plaintiff must allege that he was deprived of a right which rises to the level of a "liberty interest" or a "property interest" without due process of law; *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); and

it being the opinion of the court that property interests subject to due process protection "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits"; *Id.* at 569; and

it being the opinion of the court that in order to possess a property interest in a "benefit", "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577; and

it being the opinion of the court that plaintiff effectively concedes that he had no property interest in taking the New Jersey bar examination or being admitted to the New Jersey Bar, inasmuch as he makes no such claim; and

it being the opinion of the court that plaintiff having failed to allege a property interest, his procedural due process claim must rely on a liberty interest; and

it being the opinion of the court that plaintiff cannot show that he has a liberty interest in taking the New Jersey bar examination or in being admitted to practice law in New Jersey;[2]

it being the opinion of the court that because plaintiff has failed to present a cognizable liberty or property interest, his due process claim under the Fourteenth Amendment fails to state a claim upon which relief can be granted;

IT IS on this 19th day of July, 1993, hereby

ORDERED that defendants' motion to dismiss the complaint is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

MARYANNE TRUMP BARRY
U.S.D.J.

Footnotes

[1] To the extent that plaintiff seeks to challenge New Jersey R. 1:24-2 on equal protection grounds, that claim must be rejected out of hand. Fundamental to any equal protection claim is a classification which burdens one class while benefitting another class. *Sturm v. Clark*, 835 F.2d 1009, 1016 (3d Cir. 1987). Plaintiff's failure to even allege a classification, without more, could warrant rejection of any equal protection claim. Construing the complaint liberally, however, plaintiff appears to claim that the class of attorneys who have been disbarred in jurisdictions other than New Jersey is burdened while the class of attorneys not disbarred in jurisdictions other than New Jersey there is some doubt as to whether this "classification" can support an equal protection claim. *See Doe v. Sparks*, 733 F.Supp. 227, 232 (W.D. Pa. 1990) ("We hold that conduct which is not in itself protected by substantive due process, natural right, or some source of substantive protection cannot be the basis of an equal protection challenge by the class

which engages in the conduct"). For purposes of this motion, the court will assume *arguendo* that this classification does warrant examination under the Equal Protection Clause of the Fourteenth Amendment, an assumption in which the court has little confidence.

The first step in an equal protection analysis is to determine the applicable level of scrutiny. Classifications made on the basis of a suspect class, such as race, religion, or alienate, or which trammel fundamental personal rights, receive strict scrutiny. *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3d Cir.1992); *Sturm*, 835 F.2d at 1016; *General Offshore Corp. v. Farrelly,* 743 F. Supp. 1177, 1195 (D.V.I. 1990). Classifications based on gender or legitimacy are given intermediate scrutiny. *Craig v. Boren*, 429 U.S. 190, 197-99 (1976). All other classifications must merely withstand rational basis review. *Anderson v. City of Philadelphia*, 845 F.2d 1216, 1222 (3d Cir. 1988). It is clear beyond dispute that the right to practice law is not a fundamental right requiring strict scrutiny in the *Edelstein v. Wilentz*, 812 F.2d 128, 132 (3d Cir. 1987); *In the Matter of Roberts,* 682 F.2d 105, 108 n.3 (3d Cir. 1982); *Giannini v. Real*, 711 F. Supp. 992, 1000 (C.D. Cal. 1989).

Under the rational basis test, New Jersey's rule will be upheld as long as it bears some rational relationship to the state's purpose of maintaining high professional standards for attorneys practicing in New Jersey. In this regard, courts have been especially deferential to legislative classifications which serve to regulate licensed professionals. *See Maynard v. United States District Court of the Central District of California*, 701 F. Supp. 738, 742 (C.D. Cal. 1988), *aff'd without opinion*, 915 F.2d 1581 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1990). Plaintiff concedes, "[T]he failure to produce a certificate of good standing is a relevant factor in determining the applicant's fitness to practice law in the State of New Jersey, "yet argues "it can by no means be the sole determining factor in

this regard." Pl. Opp. Br. at 27 (emphasis in original). This concession mandates dismissal of plaintiff's equal protection claim, inasmuch as plaintiff effectively concedes that the rational basis test has been satisfied. *See Ostroff v. New Jersey Supreme Court*, 415 F. Supp. 326, 329 (D.N.J. 1976) (requirement that bar applicants have degree from an accredited undergraduate institution rationally related to ensuring high professional standards); *Nordgren v. Hafter*, 616 F. Supp. 742, 755 (S.D. Miss. 1985), *aff'd* 789 F.2d 334 (5th Cir.), *cert. denied*, 479 U.S. 850 (1986) (requirement of law degree from an ABA accredited law school in order to take the bar examination passs rational basis test). Plaintiff's additional argument that the New Jersey rule does not bear a rational relationship to an applicant's present fitness to practice law is wholly without merit. In short, his equal protection claim, assuming one has even been even raised, fails as a matter of law.

[2] In an attempt to state a cognizable liberty interest, plaintiff seizes on the language of the Supreme Court in *Board of Regents v. Roth.* He cites the Court's statement that the meaning of "liberty" must be broad and, more specifically, the Court's articulation of "the right . . . to engage in any of the common occupations of life" as among the concepts embodied in the term "liberty." 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Extracting from this language the principle of law, is a liberty interest protected by the Fourteenth Amendment, plaintiff argues that defendants' failure to provide him with a hearing prior to denying him permission to take the New Jersey bar examination abridged his constitutional rights. This claim is simply not supported by the relevant case law.

Numerous courts, including this court, have held that the application of general prerequisites to admission to the bar does not implicate any liberty interest of a potential applicant. *See Potter v. New Jersey Supreme Court*, 403 F.

Supp. 1036, 1039 (D.N.J. 1975); *see also Ostroff v. New Jersey Supreme Court*, 415 F. Supp. 326, 329 (D.N.J. 1976). Plaintiff's reliance on cases in which individuals have been singled out and denied bar admission based on personal characteristics is misplaced. *See Nolan v. Ramsey*, 597 F.2d 577, 580 (5th Cir. 1979); *Nordgren*, 616 F. Supp. at 756 (distinguishing cases in which an individual was singled out and denied the right to pursue a profession based on personal characteristics from the application of a general requirement that an applicant must have a degree from an ABA accredited law school); *Potter*, 403 F. Supp. at 1039 ("[*Willner* and *Schware*], which appear to extend a requirement of procedural due process to the 'bar candidate' situation are distinguishable from the instant situation in that they concerned allegations of moral unfitness directed personally to individual candidates, while this case involves a challenge to the imposition of general prerequisites to admission.").

Moreover, plaintiff can claim no "stigmatizing effect" or damage to his reputation which would foreclose his freedom to practice law elsewhere, as would be necessary to bring him within the sphere of liberty interests defined in *Roth*. *Roth*, 408 U.S. at 564; *see Unger v. National Residents Matching Program*, 928 F.2d 1392, 1396 (3d Cir.. 1991); *Maynard*, 701 F. Supp. at 743 (where nothing in local rule requiring admission to California bar prior to admission before the U.S. District Court in California implicated plaintiff's "good name, reputation, honor, or integrity, or imposes an stigma or other disadvantage limiting plaintiff's employment opportunities," there could be no deprivation of liberty interest). Thus, plaintiff's claimed liberty interest is illusory and his due process claim must fail.

APPENDIX C

PAUL S. MIRMAN, being duly sworn sets forth the following:

I am the Plaintiff in the above matter and am fully familiar with the facts and circumstances hereinafter set forth.

I am 50 years old, and have 20 years experience in the practice of law. I received my Juris Doctorate from Brooklyn Law School in 1969, and was admitted to the practice of law in the State of New York (Second Division) in 1971. I worked at insurance and insurance defense firms for about two years, and then joined a Plaintiff's personal injury firm, Cooper & Mulberger, in 1971. I became head of that practice in 1973, and continued as a sole practitioner through 1979. Starting in 1980, I headed a busy, growing Plaintiff's personal injury firm of four full-time attorneys, which grew to a firm of twelve attorneys by 1991. I had been disbarred from the practice of law in New York State on May 20, 1991. *Matter of Mirman*, 569 N.Y.S.2d 981 (2nd Dept. 1991). Because of the disbarment I was unable to produce a certificate of good standing and was not permitted to sit for the New Jersey Bar Examination. I was not given any hearing of any form of due process with respect to my application.

Although the disbarment in New York was in 1991, the incidents underlying that disbarment -- even if the findings in it were correct -- involved eight incidents which occurred in the early 1980's; none occurred after 1983. *Mirman, supra*. The Appellate Division did not consider the question of my present fitness to practice as shown by the procedures and office policies I established to correct the problems that led to those incidents; nor did it consider that my office had had *no* complaints whatsoever of any incident since 1983; nor did it consider that only two of the incidents arose out of client complaints.

Moreover, the New York disbarment does not, of itself, preclude me from admission to practice in New Jersey -- although it understandably raises concerns that must be addressed.

My moral character was never even called into question by the charges against me, even as related by the Appellate Division. *Mirman, supra*. So, even if the committee were to accept the findings of the New York Appellate Division as true -- which, as will be shown, the committee should not do -- my eight years as a sole practitioner, the efforts made to remedy any injury by the mistakes that occurred in the early 1980s, and my management of the firm during the eight years following the most recent incident until May of 1991, amply demonstrate that I am fit to practice law.

I bring to the New Jersey Bar considerable experience and a demonstrated ability to manage a law practice -- both as a solo practitioner, and as the head of a large-staffed, high volume law firm. I have demonstrated the ability to learn from my mistakes, and to adopt -- and adapt -- office procedures for case management to ensure that the mistakes which occurred in the early 1980s would not reoccur; under my leadership, the office was free from earlier problems in handling clients' cases from 1983 through May of 1991.

A. I ran a successful solo practice until 1979.

From 1973 until 1979, I was a sole practitioner, and specialized in Plaintiff's personal injury litigation. During that period, I was personally responsible for all aspects of the cases in my office; I personally made all court appearances, and managed the discovery and trial calendars for my cases. Like many attorneys of my generation, I often worked sixteen hours a day, seven days a week in order to try to keep up with the caseload.

As a solo practitioner, I maintained an office diary to keep track of Court appearances and utilized calendar services available in the various Courts of New York to follow the status of the cases. My practice of regular file reviews and a personal tickler system to keep track of deadlines for pleadings, motions and Court appearances was sufficient. Except for one complaint in 1975, for which I received a letter of caution (not a disciplinary action) from the Grievance Committee, none of my clients complained of the manner in which I handled their cases.

I hired my first associate in 1979; then, in 1980, I hired Joseph Levine and Tom Markovits on a full-time basis, and Michele Turchin on a part-time basis. The firm continued to keep track of its cases and deadlines by regular file reviews and using office diaries. A system of review sheets and worksheets was established so that lawyers were required to mark on each file the completion of a task in a particular case. In addition, the firm instituted a standardized procedure to review and sort incoming mail into pleadings to be answered, items that require a file review, and other urgent items, to facilitate prompt attention to files.

I was already affiliated with the various calendar service which monitored the dockets of each Court in which I practiced so that my office would be notified of Court dates on my cases.

In 1980, my staff of four attorneys struggled with a caseload of over 2,000 files.

B. The charges which led to disbarment.

1. Two charges involve mistakes made by other attorneys in the office when Mr. Mirman was out ill.

In December of 1980, while developing new office

procedures to cope with the new office staff and heavy caseload, I was hospitalized with Guillaain-Barre Syndrome. From then until mid-February of 1981, I was paralyzed in the hospital, and there unable to work. Even upon release from the hospital in late February 1981, I was confined to my home and unable to return to work until late Spring 1981. From July 1981 to September 1981, I gradually returned to work, starting with a few hours per day and gradually increasing my time. In September of 1981, I returned to work on a full-time basis.

During my illness, Joseph Levine assumed responsibility for monitoring and assigning cases in the office, and for implementing office review procedures. Thus, when I returned to my practice on a full-time basis in September, Levine had essentially been running the office for nearly a full year without my input or control.

Two of the charges for which the New York Appellate Division ultimately disbarred me involved actions -- or, more accurate inactions -- taken by other attorneys while I was out of the office with Guillian-Barre disease: Charges One and Six.

In charge one, I had been retained in 1979; after completing discovery, I had the case placed on the New York Supreme Court trial calendar in June of 1980. Then, during my hospitalization, the case was transferred to the New York Civil Court. The case appeared on that Court's trial calendar, but was adjourned twice -- and then did not appear on the calendar. Mr. Levine, who was handling the

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1. Webster's Third New International Dictionary defines *Guillain-Barre Syndrome* as a neurological disorder of unknown cause characterized by sensory disturbances in the extremities and slight to severe locomotor impairment.

case at that time, decided to wait for a new date -- rather than take the affirmative steps necessary to obtain a new date. Levine did not tell me that the case had been transferred; nor that the case has been adjourned, making affirmative steps necessary to bring the case onto the trial list.

In May of 1983, when the client wrote to me asking about the case's status, I made the necessary inquiries, and found that the case had never been rescheduled for trial. I took the appropriate steps, and the case was settled to the client's satisfaction.

The case underlying charge six stemmed from an initial failure to appear at a pre-calendar hearing with my client in March of 1981, and because the client failed to appear for an examination before trial on May 11, 1981. At both times, I was ill with Guillain-Barre disease. The case was not dismissed for that reason, but for a subsequent failure to appear at a new examination date; my office could not reach the client to notify her because she had moved (to South America) without notifying me. Because I could not contact my client, I was unable to oppose the dismissal.

When she returned, I got the case reinstated -- until the Appellate Division held that the client's move to South America without notice constituted an abandonment of her cause of action, and reversed the reinstatement. *Zaldua v. Metropolitan Suburban Bus Auth.*, 97 A.D.2d 842, 843, 467 N.Y.S.2d 917 (1983).

2. The other six charges arose as a result of rapid office growth between 1980 and 1984.

...continued...

2. Levine was a senior attorney with extensive trial experience.

I began reestablishing control over my firm's practice in October of 1981. Levine, on whom I relied heavily, left the firm in March of 1982. However, Turchin began working on a full-time basis; with her assistance and that of other attorneys in the office, I successfully managed a case load of approximately 2,000 cases in 1982 -- and an increasing case load over the next few years.

Six charges occurred between 1980 and 1984 during the firm's most rapid growth, and during a time when it was admittedly having difficulty adapting procedures to the needs of the cases. [3]

Three of the charges arose out of mistakes of judgment exercised by other attorneys in the firm. (Charges 2,4, and 5). In charges 2 and four, the charges involved (partly) a failure to take a default judgment within one year of a Defendant's default.

Charge 2 involved a two-Defendant motor vehicle collision; one insurer refused to file an answer despite numerous letters from an associate, then obtained a dismissal of the action because my office had not taken a default judgment. The dismissal was conditionally vacated when the Court learned that the matter had been pursued against the Defendant through correspondence, but the case was ultimately not reopened due to the absence of a physicians' affidavit to establish the merit of the injury claims. However, it is important to note that the client's case was unsccessfully pursued as an uninsured motorist claim against the other driver, who was uninsured.

Charge 4 arose because of an erroneous title report

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3. This problem was exacerbated by my illness in 1981, as well as by my attac of multiple sclerosis in 1984 which kept me out of the office for a period of months. However, I recovered from the and the oversight of my office until 1991.

identifying the City of New York as the owner of a building in which my client was injured. The associate attorney then sought leave to file a late notice of claim against the City, which was denied; *Montana v. City of New York*, 96 A.D.2d 1031, 466 NY.S.2d 436 (1983); however, because title to the property had, in fact, reverted from the City to the original Defendant, the issue was moot. (The client ultimately decided not to pursue the case.)

Charge 5 arose out of an associate's decision to file a superseding action rather than file a bill of particulars in an initial suit, because the Defendant claimed that the first suit was a nullity because of the failure to hold a pre-suit hearing; the Court held that the first suit was not a nullity, and dismissed it for failure to file a bill of particulars. My firm ultimately compensated the client in a malpractice settlement.

The three other charges arose out of clerical errors in filings or in court appearances. Charge 3 related to the late filing of a bill of particulars by an employee in 1983, causing the case to be dismissed; the client was advised to obtain separate counsel and pursue a malpractice claim against the firm. Charge 4 involved an unsuccessful attempt to reinstate a case that was dismissed for failure to appear at a calendar call in 1983, which was not reinstated because of an unexecuted affidavit; the client was contacted, and decided not to pursue the matter. Charge 8 involved an uninsured motorist claim which was dismissed in 1983 because the clerk sent to seek an adjournment (and call one of the attorneys if needed) went to the wrong courtroom, resulting in a default for failure to appear. That default was vacated, sanctions assessed and paid, and the case proceeded to arbitration.

Those incidents occurred in the early 1980s at a time when my law practice was expanding rapidly; several occurred because an associate employee through inexperience or miscommunication, missed deadlines on a

case for which that associate was responsible -- without notifying myself what had happened until after the fact. Plainly the only error on my part was failing to adequately supervise those subordinates.

C. I successfully established office procedures for tracking and controlling the firm's caseload

The errors of the early 1980's are regrettable. However, in considering my *present* fitness to practice law, the Court should note -- as the Appellate Division failed to -- the steps taken to eliminate such mistakes for the future and to expeditiously process the firm's cases. Rather than exhibiting a pattern of neglect, I took all appropriate and necessary steps to remedy the defects which caused those mistakes which occurred during the early periods of the firm's growth -- starting before the incidents underlying the eight charges, and changing or adding procedures whenever it appeared that a particular procedure had allowed a case to "slip through the cracks."

During the years 1981 to 1986, the firm took and processed approximately 1,000 cases each year. Over that period, the firm, under my direction, regularly reviewed and improved its case management process in order to handle its large case load effectively. Once I was able to return to work in 1981, the firm's entire filing system was revamped, and a card tickler system was instituted. In 1982, the firm instituted separate diaries for court dates, motions, and examinations before trial. Markovits was assigned responsibility for supervising the court appearance diary and ensuing that all court appearances were properly covered.

By 1984, the firm had expanded to nine full-time lawyers including Mr. Mirman and Ms. Turchin. The firm instituted training classes for associates, which included specific instruction on file reviews and calendar control. In

addition, one lawyer, Jeffrey Schwartz, was given specific responsibility for ensuring that motion deadlines were met. Calendars were prepared daily, setting forth each attorney's court assignments. Further, the firm continued to utilize court monitoring service in all relevant courts in which they were available.

Beginning in 1986, the firm made a conscious effort to reduce the number of new cases, downsizing to handle a smaller, more concentrated, caseload. The firm began to color code its files so that all files for cases begun in a particular year would be a particular color -- calling attention to older cases which might require more immediate attention. A new progress sheet was added to the files to better manage the work done and work to be done in each case, as well as court dates. In addition, a new four-copy court appearance form was utilized, noting the result of every court appearance was noted, and any subsequent obligations to be met. One copy of the form went to the file itself; two copies to the supervising attorney and one copy entered into the firm's computer.

Beginning in 1988, the firm's computer became part of a New York Law Journal computer project, an interactively networked computer system which tracked all important deadlines and dates, as well as court appearances, and provided a "tickler" system for the deadlines for all pleadings or other court papers.

By 1991, my firm employed twelve full-time attorneys, thirteen secretaries, ten file clerks, one receptionist, a calendar clerk, an examination before trial clerk, and two clerks responsible for physical exams and similar orders. The firm conducted weekly calendar meetings, and hired a former court clerk to operate a managing clerk's office for the firm.

D. My office had no complaints during the last eight years I managed the office.

Prior to, and partly in response to, the incidents which underlay the disciplinary proceedings against him, I undertook extensive and successful efforts to track procedural litigation events. I improved and implemented numerous systems before, during, and since 1984 in order to avoid case defaults and to ensure that the cases entrusted to him received the diligent attention that they deserved. Those efforts, and the fact that there were no subsequent complaints of mishandling cases after 1984, show my commitment to serving my clients, and show that I am fully capable of managing a large, high-volume practice.

E. I attempted to compensate for or repair the damage to clients injured by my firm's errors.

I was disbarred in New York solely for the cause of neglect; many of the incidents involved the actions of my associates at times in which I was physically ill, or, in other cases, where I had not been advised by those associates of the information surrounding the incidents. I admittedly had supervisory responsibility in those cases; and, once informed of them, promptly took steps to correct the problems and to reduce the chances of their reoccurrence.

Without discounting the seriousness of the claims made against myself, I was not accused of any immoral conduct; nor was it charged that I took advantage of my clients. The gravamen of the claims against me were based on neglect. While the eight incidents which occurred between 1978 and 1984, in addition to those eight cases, during that time, my office handled a very high volume of cases without mishap.

Even assuming that the New York Appellate Division correctly held me personally accountable for all eight of the charges, the fact is that none of the clients whose cases led to those charges were injured.

In each of the eight cases relied on by the New York

Appellate Division, I attempted, where possible, to repair any injury that had been caused by my office's mistakes. In three cases, I successfully obtained recoveries satisfactory to my clients, either by reinstatement of the claims, or through a different forum. (Charges 1, 2 and 8). In two others, when I could not remedy the situation, I advised the clients to seek separate counsel to bring a malpractice claim against me -- both of which I settled out of court. (Charges 3 and 5).

In the three remaining claims, no action could be taken by myself, because the clients abandoned or decided not to pursue the claims for which they had retained me. In one, the client left the country. (Charge 6). In another, the client was unavailable for an inquest, and was never heard from again. (Charge 4). In the last, the client never sought to pursue the matter once it was dismissed; nor did he file a complaint. (Charge 7).

F. Disbarment was an extraordinary sanction for charges which involved negligent supervision and not immoral conduct.

At most, the charges arose due to mistakes by myself as an administrator of other attorneys; in some, I was out of the office due to illness when they arose; in others, I had not been informed of the attorney's error until some time after the error had been committed -- making the error virtually impossible to prevent. In none of the cases did I myself perform or direct the negligent actions which were taken. Importantly, none of these charges involved immoral conduct.

The harshness of the penalty imposed on myself is even more significant because, in New York, an attorney who is disbarred may not even apply for reinstatement for at least seven years from the date of disbarment. N.Y. Ct. Rules (App. Div. 2d Dept.) Section 691.11(a).

No other New York attorney had been disbarred unless his or her conduct involved some allegation of immoral or knowing misconduct. No other New York attorney has been disbarred solely for alleged misconduct by *other* persons.

In a review of 297 cases reporting disbarments in New York, 129 resulted from a felony conviction; 15 resulted from convictions for other serious crimes. Serious misconduct involving the handling of clients' funds accounted for 107 disbarments, and fraud led to 65 others. 20 others resulted from either practicing law while suspended, or contemptuous failure to appear before or cooperate with disciplinary investigations, combined with underlying charged misconduct.

None of those cases reported a disbarment for neglect of a client's affairs, without more. All involved intentional misconduct. In a similar case in New York finding supervisory neglect, the attorney was censured for delays caused by his employees' negligent handling of a high volume of cases -- not disbarred. *In re Kraft*, 148 A.D.2d 149 (1st Dept. 1989). In another case, the same Appellate Division which later disbarred me held that "an attorney may be disciplined for his employees' neglect which he did not authorize and of which he had no knowledge." *In re Neimark*, 13 A.D.2d 676, 214 N.Y.S.2d 12, 13 (2d Dept. 1961).

All of the incidents which resulted in my disbarment (including the letters of admonition referred to in the Appellate Division's decision) occurred in the early 1980s. During and since that time, I instituted new procedures to guard against those problems -- an effort which I increased whenever it became apparent that the existing policies were

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4. Copy attached as Exhibit A.
5. Copy attached as Exhibit B.

not sufficient to maintain control over the firm's caseload. Under my direction, the firm avoided recurrences of the problems which arose in the early 1980s, and ensured that cases entrusted to my firm were handled diligently and in accordance with the Rules of Professional Conduct. The success of those procedures is shown by the firm's success, and by the fact that there were no complaints of alleged neglect after 1983.

G. The New Jersey Board of Bar Examiners has wrongfully rejected my application for admission to the State Bar

On or about December, 1991 I submitted an application to the New Jersey Board of Bar Examiners. The application was accepted and I sat for the February 1992 bar examination.

Due to my aforementioned physical impairment I was unable to successfully complete the essay part of the bar examination.

I requested the right to dictate the answers on an electronic recording device but said request was denied.

Thereafter, on or about May, 1992 I re-applied for admission to the bar of the State of New Jersey. My application was this time rejected on the basis that I did not furnish a certificate of good standing from the State of New York.

I was not given a hearing or any opportunity to be heard in any form, to demonstrate my fitness to practice law in the State of New Jersey. The Defendant's indiscriminate rejection of my application without according any form of due process violated my rights of due process and equal protection within the meaning of the Fourteenth Amendment.

CONCLUSION

For the previously stated reasons, my disbarment by the Appellate Division (2d Dept.) of New York for mistakes which occurred in 1980 through 1983 does not preclude my admission to practice in the State of New Jersey, because the Appellate Division did not address my *present* fitness to practice law, and never suggested that I am not a person of good moral character. Accordingly, I request an opportunity to meet with the committee to establish that I am presently fit to practice law in the State of New Jersey, I request a full and fair hearing with respect to my application to practice law in the State of New Jersey.

_____

PAUL S. MIRMAN

Sworn to before me this
28th day of May, 1993

_____

Notary Public

APPENDIX D

By an order of reference dated October 7, 1988, this Court directed that the issues raised by the petition of the Grievance Committee for the Second and Eleventh Judicial Districts, verified on May 5, 1988, and by the answer of respondent, verified on June 8, 1988, be referred to the undersigned special referee to hear and report thereon.

Petitioner appeared by Dianna Maxfield Kearse, Esq. and Robert J. Saltzman, Esq., assistant counsel to Robert J. Strauss, Esq., Chief Counsel.

Respondent appeared initially with Nicholas C. Cooper, Esq. and subsequently with Jerome Karp, Esq.

The Charges

On March 19, 1969, respondent was admitted by this Court to the practice of the law.

Eight charges of professional misconduct as defined by Disciplinary Rules 1-102(A)(1), (5) and (6), 6-101(A)(3) and 7-101(A)(1) and (2) of the Code of Professional Responsibility, and by the Rules of the Appellate Division, Second Department governing the conduct of attorneys, Section 691.2, were lodged against respondent.

Charge I

Respondent neglected a legal matter in which he had been retained in or about December 1978 to represent Irma Kantor for the recovery of damages in a personal injury automobile accident case. The action was commenced and on June 6, 1980 was placed on the Supreme Court, Kings County calendar. Thereafter, it was transferred to the Civil Court, After the case failed to appear on the Civil Court calendar on an adjourned date,

June 1, 1981, respondent failed to proceed further with the case for approximately two years. Respondent failed to take any remedial steps until after notification by the petitioner herein of Mrs. Kantor's complaint.

Charge II

In 1980, respondent was retained by Magdalia Castillo, et al., in an automobile personal injury case. On October 29, 1981, a summons and complaint were served. Although defendant did not appear or answer, respondent failed to institute proceedings for the entry of a default judgment within the prescribed statutory period. On June 20, 1983, the defendant moved to dismiss the case for failure to take a default judgment within one year of the default. This motion was granted on default. Subsequently, the court agreed to relieve respondent of his default, conditioned upon the submission of an affidavit of merit. Ultimately the action was dismissed due to respondent's failure to provide a sufficient affidavit of merit.

Charge III

In November 1982, respondent was retained by Ermelindo Lugardo, Maria Garcia, et al., to institute an action for personal injuries sustained in an automobile accident. On April 8, 1983, defendant served an answer and a demand for a verified bill of particulars. Respondent failed to provide a bill of particulars. On August 5, 1983, the defendant moved to preclude plaintiff. On September 12, 1983, a conditional order of preclusion was entered in the Supreme Court, on consent, allowing service of the bill of particulars within 60 days. Served after the lapse of 60 days, the bill of particulars was rejected. Thereafter, respondent's motion, dated March 14, 1984, to extend his time was denied on May 16, 1984 by the Supreme Court,

and the defendant's cross-motion for summary judgment was granted. On April 15, 1985 the order of the Supreme Court dismissing respondent's complaint was affirmed by the Appellate Division, Second Department. Respondent failed to notify his clients of this dismissal until after notification by the Grievance Committee.

Charge IV

On or about September 29, 1978, respondent was retained by Ramon Montana, age 8, in a staircase personal injury case.

On October 13, 1978 respondent served a summons and complaint upon David Gechter, the purported owner of the premises, as reflected in a title report obtained by respondent. No answer was served; respondent failed to enter a default judgment within the statutory prescribed period.

On October 8, 1981 respondent obtained another title report which reflected that the property had been owned by the City of New York at the time of the accident. On May 18, 1982, respondent moved for leave to serve a late notice of claim upon New York City. The Appellate Division, Second Department, reversed the Special Term and as a result the action was dismissed.

Charge V

In June 1981, respondent was retained by Renee Dodge for injuries sustained in a fall on property owned by the New York City Housing Authority. In February 1982, a summons was served upon the Housing Authority. On April 6, 1982, defendant served an answer and a demand for a bill of particulars. On July 30, 1982, a 60-day conditional preclusion order was served upon respondent. Respondent failed to comply. On March 22, 1983, summary judgment

was granted and the complaint was dismissed. On March 4, 1985, the Appellate Division, Second Department, affirmed the summary judgment.

Charge VI

Respondent was retained by Magaly Zaldua for injuries sustained October 9, 1978 in a bus owned by Metropolitan Suburban Bus Authority. On March 13, 1979 respondent commenced an action. Issue was joined on April 3, 1979. On December 28, 1981, the Supreme Court, Nassau County, granted defendant's motion to dismiss for failure to prosecute and to comply with an order of the court. Respondent failed to oppose the motion to dismiss. On December 3, 1982, a year later, respondent obtained an order conditionally reinstating the matter. On November 28, 1983, the Appellate Division, Second Department, reversed and ordered the action dismissed, citing "...over three years of laxity and neglect on the part of the plaintiff's attorneys."

Charge VII

On August 25, 1982, respondent was retained by Robert Austin, Jr., in a personal injury automobile accident case. Respondent filed an uninsured motorist claim. An arbitration hearing was then scheduled for November 23, 1983 in the Supreme Court, Queens County. Respondent failed to appear. The hearing proceeded; all issues were resolved against Austin and arbitration of his claim was "forever stayed."

On January 23, 1984, respondent's motion to vacate the above order and judgment was denied without prejudice and with leave to renew upon submission of a transcript of the November 23 proceeding and an affirmation from the

attorney setting forth a valid excuse for his failure to appear both at the calendar call and the trial part.

Respondent's renewed motion was denied by order dated April 25, 1984, the Court finding the excuse offered for the attorney's non-appearance "grossly inadequate" and an example of "inexcusable law office failure," compounded by the submission of an unexecuted affirmation. The Appellate Division, Second Department, on April 8, 1985 affirmed the lower court' order.

Charge VIII

In 1981, respondent was retained by Raymond and Sirimar Gonzalez to bring an automobile personal injury action. Respondent filed for uninsured motorist arbitration pursuant to his client's insurance policy. The client's insurance carrier obtained a stay of arbitration.

On June 3, 1983, the case appeared on the Supreme Court, New York County calendar on the issue whether the offending vehicle was insured. After several adjournments by respondent, on October 24, 1983, the case was marked "final." On that day, respondent received a continuance to November 23, 1983. Respondent was advised "that a failure to appear and proceed on that date would result in the granting of the carrier's requested relief." Failing to appear on November 23, a permanent stay of arbitration was granted.

By an order of the Appellate Division, First Department, respondent's default was vacated. The Court noted "with disfavor the deliberate flouting of the Rules of Part XI by (respondent) and would agree that such dilatory conduct is inimical to the orderly administration of a trial calendar ..." Respondent was personally ordered to pay $1,000 costs to the other party.

The Answer

Charge I

On January 4, 1979, Irma and Murray Kantor retained respondent's law firm in connection with a motor vehicle accident of December 29, 1978.

Respondent alleges that the Civil Court, Kings County, neglected to include the case on the printed calendar for June 1, 1981. Further, the Civil Court failed and refused to correct its error despite repeated attempts by associates in respondent's office to compel the Court to correct its error. Ultimately, a motion was made by respondent's firm to compel the Court to assign a trial date to the case.

Charge II

Magdalia Castillo retained respondent's law firm on April 22, 1980. Summonses and complaints were served on October 29, 1981. CPLR 3215(c) is not inflexible regarding the time to take steps for entry of a default. Respondent's firm took appropriate action and "did not abandon the cause of action" as Judge Aaron Bernstein found in his memorandum decision of May 14, 1984.

By notice of motion dated June 20, 1983, defendants Bautista Castillo and Luis Rubio moved for an order pursuant to CPLR 3215(c). Court records document that it was not respondent but Jeffrey Schwartz, Esq. who was assigned to argue the motion pursuant to CPLR 3215(c). The attorney did not fail to appear but was "simply late." His lateness was excused and the default in answering the motion was vacated by Judge Aaron D. Bernstein in a memorandum decision, dated May 15, 1984.

In a memorandum decision, dated August 6, 1984, Judge Bernstein stated that an affidavit was required from

"someone with knowledge that the injuries sustained ... permit ... this action under the no-fault law," namely, a physician, and not from respondent.

A course of action to obtain such a document was obviated by electing to pursue uninsured motorist benefits which provided the client with the same monetary benefits as the action-at-law and resulted in a speedier, more successful adjustment of the client's claim than continuing to pursue the action-at-law would have provided.

Charge III

Ermelindo Lugardo, Marie Vasquez, Carlos Vasquez and Maria Garcia retained respondent's law firm. Respondent served a bill of particulars. The defendant interposed answers dated April 8, 1983 and November 9, 1983, and demands for bills of particulars for each answer. Respondent served a bill of particulars. A motion, dated August 5, 1983, asked for an "order precluding the plaintiffs from offering any evidence at the trial of this action ... or in the alternative, compelling plaintiffs to respond to the demands." An order served on September 22, 1983 provided that plaintiff could serve the bill of particulars until December 1, 1983. The bill of particulars was served on December 14, 1983, approximately 13 days after the 60-day period, due only to an unintentional ministerial breakdown of standard office procedures.

maria Garcia, Carlos Vasquez and Maria Vasquez disappeared, abandoning their action, and could never be located.

Charge IV

Margarita Sanchez retained respondent for injuries to Ramon Montana, aged eight. A summons and complaint were served on David Gechter, owner of the property, as

reflected in title reports.

A motion for a default judgment could not be instituted because the clients could not be located and never made themselves available to provide the required verified complaint or affidavit of merits pursuant to CPLR § 3215(e). Ramon Montana has three years remaining to serve a summons and complaint within the period of the statute of limitations.

Respondent admits that he received a title report, dated October 8, 1981, showing the City of New York to be the owner of the property, but denies that the City of New York owned the property at the time of the accident.

On November 12, 1981, within four weeks of notification that "some entity other than the rightful one" may have owned the property, respondent moved for leave to serve a late notice of claim upon the City of New York by notice of motion returnable November 30, 1981, to protect the infant's rights.

Although respondent admits that the Appellate Division reversed Special Term, he asks that judicial notice be taken of the fact that the City of New York did not own the property at the time of the accident and thus there was no case against the City of New York. The motion to serve a late notice of claim had to be denied as it was not supported by an executed notice of claim pursuant to General Municipal Law 50-e.

Charge V

Respondent's firm was retained by Renee Dodge. Respondent admits that a premature summons and complaint were served on February 24, 1982 "to protect plaintiff's rights in the event that the defendant waived, adjourned, or otherwise frustrated satisfying the condition precedent to suit, namely the statutory hearing." A summons and complaint were thereafter served on July 13,

1982, following the 50-h hearing of June 29, 1982, which commenced a proper, viable action to which defendant never interposed an answer, despite repeated attempts by respondent's firm.

On April 6, 1982, an answer was served, which stated: "...The complaint is a nullity and should be dismissed, pursuant to General Municipal Law 850(i)."

A bill of particulars was served. The matter was assigned to a "trusted, capable member of the bar in good standing, Thomas Markovitz, Esq." who, in reliance upon defendant's own answer that the complaint served prior to the 50-h hearing was a nullity, judicial authority to the effect that a complaint served prior to a statutory hearing can be dismissed, and agreement with defendant's counsel that defendant would withdraw their motion for summary judgment, exercised his professional judgment as an attorney in regard to service of the bill of particulars.

Charge VI

Respondent alleges that he submitted papers in opposition to defendant's motion to dismiss, resulting in a conditional order for plaintiff Magaly Zaldua's deposition, except that respondent admits that said plaintiff abandoned her action by going to Colombia, South America for seven months without any contact with her attorneys and failed to comply with court orders, resulting in defendant's motion to enter judgment. The Appellate Division's decision, dated November 28, 1983, dismissed the case due to plaintiff's abandonment of her case. It stated: "...Plaintiff's voluntary departure from the United States for about seven months and her total lack of contact with her attorneys during this period, in which time the judgment against her was entered, do not indicate an intent to actively prosecute her claim. Therefore, plaintiff's motion to vacate the order and judgment dismissing her complaint should have been

denied."

Charge VII

Respondent's law firm was retained by Robert Austin. Respondent filed a notice of intention to make claim for uninsured motorist benefits and served a demand for arbitration. Respondent alleges that following a petition to stay arbitration, the matter was set down for a framed-issue hearing on the question only of insurance coverage of the vehicle in question.

The framed-issue hearing was not assigned to respondent but to Michael O. Palillo, an employee of respondent's firm. Palillo did not fail to appear but appeared late. Following the appeal, a motion upon a signed affirmation of Michael Palillo was not pursued only due to the clients lack of interest "and injuries," thus abandonment of his claim.

A motion was denied without prejudice to renewal and the motion was renewed. The Appellate Division did not ratify and dicta by the lower Court and denied the appeal only because Michael Palillo's reason for his lateness was not validated by his signature on his affirmation. The Appellate Division wrote:

> Appellate failed to offer a valid excuse for his default, as required by CPLR 5025(a)(1). Specifically, the "affirmation" of the attorney assigned to the case was not signed, and was therefore of no force or effect (CPLR 2106).

Charge VIII

Respondent's law firm was retained. "It was the

professional legal judgment of respondent's office that if a hearing on the issue of insurance coverage proceeded without the *prima facie* proof of non-insurance, (the copy of the suspension order on the driver/owner of the offending vehicle from the New York State Department of Motor Vehicles), that issue would have been resolved against the client and a permanent stay of execution would have issued and that therefore adjournment of the framed-issue hearing was mandated."

Documents of record prove that the firm specifically assigned one of its employees, Bruce Marx, and *not* respondent, to cover the matter on November 21, 1983. Bruce Marx arrived late. The preliminary and permanent stays of execution were vacated. The parties were directed to proceed to arbitration. The matter is pending before the American Arbitration Association for full resolution of claimant Gonzalez's uninsured motorist claim.

The Appellate Division, First Department, unanimously reversed "on the law" and "on the facts" and "in the exercise of discretion" Judge Stanley Ostrau's error in refusing to excuse Bruce Marx's lateness and the necessity for obtaining the proof of lack of insurance prior to the framed-issue hearing.

First Affirmative Defense to Charges I-VII Inclusive

These charges fail to state a violation of the Code of Criminal Responsibility in that facts sufficient to establish that respondent "neglected a legal matter entrusted to him" are not alleged.

Second Affirmative Defense to Charges I-VIII Inclusive

The claims underlying the charges were never neglected but instead were continually worked on by respondent's firm, which took numerous necessary steps for

the advancement thereof.

Third Affirmative Defense to Charges II,V,VII and VIII

Respondent's office provided an employee specifically for the assignments in question - Jeffrey Schwartz in Charge II, Thomas Markovitz in Charge V, Michael Palillo in Charge VII, and Bruce Marx in Charge VIII.

The inability of the employee to cover the assignment occurred without respondent's knowledge, consent or authorization and despite direction by respondent's firm. Such error does not constitute a violation of the Code of Professional Responsibility by respondent individually. See *In re Wilson*, 170 N.Y.S. 725, 729.

Fourth Affirmative Defense to Charges II, V, and VIII

Respondent was not neglectful in assigning the matters to trusted, capable employees of the firm.

Fifth Affirmative Defense to Charges II,V,VII and VIII

To the extent that respondent is being charged for acts which he did not commit, he is being deprived of due process rights.

Sixth Affirmative Defense to Charges II, III, V, VII and VIII

Any error on the part of respondent's respondent's firm was an unintentional ministerial error or unintentional ministerial breakdown in standard office procedures. They did not constitute a violation of the Code of Professional Responsibility.

Seventh Affirmative Defense to Charges II, III, V, VII and VIII

Following the unintentional ministerial error, respondent's firm took numerous steps to correct the error on its own initiative.

Eighth Affirmative Defense to Charges I, II and VIII

The inadvertent ministerial error, by whomever committed, was in fact corrected due to steps taken by respondent's office.

Ninth Affirmative Defense to Charges II, IV, VI, VII and VIII

The inadvertent ministerial error was rendered moot.

In regard to Charge II (Castillo), an election was made to pursue the uninsured motorist benefits, which excluded recovery through the action-at-law in which a doctor's affidavit is required.

In regard to Charge IV (Montana), no cause of action existed against the City of New York, thus suing it or moving for a late notice of claim was pointless. Further, taking a default against the defendant Gechter, even if permissible under the Civil Practice Laws and Rules was useless, as the clients were not available to hold an inquest.

In regard to Charge VI (Zaldua), the client had no intent to prosecute her claim actively, and abandoned it.

In regard to Charge VII (Austin), the client had no cause of action, as he had no damages and, in addition, this client determined not to pursue his claim.

In regard to Charge VII (Gonzalez), respondent won the petition to stay arbitration due to respondent's having obtained the *prima facie* proof of no insurance and the case

is pending before the American Arbitration Association.

Tenth Affirmation Defense to Charges I and II

The charges fail to state a violation of the Code of Professional Responsibility in that the cases were successfully concluded and settled by respondent's firm.

Eleventh Affirmative Defense to Charges III and V

When the ministerial error could not be corrected, respondent's firm so advised the clients of that and advised them to obtain independent counsel to determine their rights. The clients did in fact obtain independent counsel and respondent's firm paid a settlement figure negotiated by said independent counsel on behalf of the clients.

Twelfth Affirmative Defense to Charges III, IV, VI and VII

The clients failed to keep in touch with respondent's firm, could not be located, abandoned their claim, or otherwise indicated their intent to forego pursuing their claim.

The abandonment by the clients precluded respondent as follows:

(a) Charge III - Maria Vasquez, Carlos Vasquez, and Maria Gonzalez were thus not advised of the outcome of their case.

(b) Charge IV - No default judgment could be obtained against David Gechter, owner of the premises, because such a motion, pursuant to CPLR 2215(a) must be accompanied by a summons and complaint verified by the plaintiff or an affidavit of merits executed by the plaintiff. A motion to serve a late notice of claim would ultimately

won for a default or for a late notice of claim, the claim could not be further prosecuted without client participation.

(c) Charge VI - Magaly Zaldua's lack of interest to pursue her case precluded respondent's firm from holding or completing discovery and her departure from the United States for approximately seven months without contact with her attorneys, while depositions were pending precluded her deposition and opposition to defendant's motion to enter judgment.

Charge VII - Robert Austin closed his case due to lack of injuries, thus precluding respondent's firm from moving to renew the motion to vacate the stay of arbitration.

Thirteenth Affirmative Defense to Charges I, II, IV, V, VI, VII & VIII

Respondent or attorneys associated with him permissibly exercised their professional legal judgment in pursuing one course of action as compared to another in regard to each of the claims.

The exercise of that professional legal judgment was in conformity with DR 7-101(B)(1).

Fourteenth Affirmative Defense to Charge II

The clients could not recover twice for the same injuries.

An election had to be made between the action-at-law and the uninsured motorist proceeding.

Claimants elected to pursue their uninsured motorist benefits to the exclusion of the action-at-law.

Fifteenth Affirmative Defense to All Charges

The petition cannot be prosecuted and must be dismissed by reason of petitioner's failure to comply with Appellate Division Rule 691.4(e)(4) and (f) (22 NYCRR 691.4 *et seq.*) which mandate respondent's right in a probable cause hearing before a committee or subcommittee prior to the institution of formal disciplinary proceedings in the Appellate Division.

Sixteenth Affirmative Defense to All Charges

To the extent that it is alleged that respondent violated D.R. 1-101(A)(5), the charges fail to state a violation of the Code of Professional Responsibility in that facts sufficient to establish that respondent "engaged in conduct prejudicial to the administration of justice" are not alleged.

Seventeenth Affirmative Defense to All Charges

To the extent that it is alleged that respondent violated D.R. 1-102(A)(6), the charges fail to state a violation of the Code in that facts sufficient to establish that respondent "engaged in any other conduct that adversely reflects on his fitness to practice law" are not alleged.

Eighteenth Affirmative Defense to All Charges

Section D.R. 1-102(A)(6), as written and applied, is unconstitutionally vague and "multiplitious" and is void for vagueness.

Nineteenth Affirmative Defense to All Charges

To the extent that it is alleged that respondent

violated D.R. 7-101(a)(1) and (2), the charges fail to state a violation of the Code in that facts sufficient to establish that respondent intentionally failed to "seek the lawful objectives of his client ... " and failed "to carry out a contract of employment entered into with a client for professional services ..." are not alleged.

As a Twentieth Affirmative Defense to Charges III to VIII Inclusive

Charges III through VIII are based on *sua sponte* investigations independently commenced by petitioner based upon facts disclosed in published decisions of the Appellate Division, Second and First Departments.

Upon information and belief, petitioner received no direct instructions from the Appellate Division to conduct such "*sua sponte*" investigations and therefore prosecution on them is unauthorized.

As a Twenty-First Affirmative Defense to All Charges

The petition violates respondent's due process rights in that the charges are unconstitutionally vague and are void for vagueness.

As a Twenty-Second Affirmative Defense to All Charges

Respondent is deprived of equal protection of the laws and is being selectively persecuted.

By order to show cause dated June 10, 1988, respondent caught a dismissal of the petition on the ground that he had been denied a probable cause hearing before the Grievance Committee. By order dated October 7, 1988, the application was denied.

The Proceedings

A pre-trial conference was held on November 18, 1988.

Hearings were held on January 12, March 3, March 20, April 17, June 22, October 24, November 21 and December 8, 1989. On October 24, 1989, Jerome Karp, Esq. was substituted for Nicholas Cooper, Esq., as attorney for respondent.

CONCLUSIONS

> The law is well established that while an attorney may not be disciplined for his employee's neglect and of which he had no knowledge ..., he may and should be disciplined for his own carelessness and failure to supervise adequately the operations of his office.

Matter of Namark, 13 A.D.2d 676, (2d Dept. 1961).

See aldo, *Matter of Kraft*, 148 A.D.2d 149 (1st Dept. 1989); *Matter of Phillies*, 17 A.D.2d 93, 101 (4th Dept. 1962).

Respondent's intimate knowledge of what was going on in his office with respect to each and every case is unmistakably apparent in his testimony before counsel to the Grievance Committee summarized above.

I find that Charges I, III, V, VI and VII have been proven by a preponderance of the evidence. I further find that Charges II, IV and VII have not been proven by a preponderance of the evidence.

Respectfully submitted,

J. MITCHELL ROSENBERG
Special Referee

December 10, 1990

APPENDIX E

TO: File

RE: STANDARD OF PROOF

I STANDARD OF PROOF

Clear and Convincing Evidence

Alabama*
Alaska*
Arizona. *In re Luri*, 113 Ariz 95, 546 P2d 1126 (1976)
Connecticut*
D.C.*
Hawaii*
Illinois. *In re Bossov*, 60 1112d 439, 328 NE2d 309, *cert denied*, 423 U.S. 928 (9175);
Indiana. *In re Moore*, No 1281 S 343 (Ind SupCt. Sept. 26, 1983) (standard may not be constitutionally required by the interest at stake, but it conforms to the court's analysis of the disciplinary process);
Louisiana. *Louisiana State Bar v. Edwins*, 329 So2d 437 (La 1976);
Maryland. *Bar Association of Baltimore v. Posner.* 275 Md 250, 339 A2d 657, *cert. denied.* 423 U.S. 1016 (1975);
Minnesota*
Nevada*
New Jersey. *In re Gross*, 67 NJ 419, 341 A2d 336 (1975); - Tennica i77 A272 (730)
North Carolina. *In re Palmer*, 296 NC 638, 252 SE2d 784 (1979) (judicial, not statutory proceeding);
North Dakota*
Ohio*

Oklahoma*
Oregon. *In re Gygi*, 273 Or 443, 541 P2d 1392 (1975);
Rhode Island*
South Carolina. *In re Friday,* 263 SC 156, 208 SE2d 535 (1974);
Wyoming*

II EQUIVALENT OR LOWER STANDARD

California. *Davidson v. State Bar*, 17 Cal3d 570 551 P2d 1211, 131 CalRptr 379 (1976) (convincing proof to a reasonable certainty);
Colorado, *Dunbar v. Weinstein*, 135 Colo 541, 312 P2d 1018 (1957)(substantial, clear, convincing, and satisfactory);
Florida. *The Florida Bar v. Rayman*, 238 So2d 594 (Fla 1970) (mere preponderance is not sufficient - conclusive proof);
Idaho. *In re May*, 96 Idaho 858, 538 P2d 787 (1975)(clear showing of bad intent);
Iowa. *Iowa State Bar Association v,. Kraschel*, 260 Iowa 187, 148 NW2d 621 (1967) (convincing preponderance -- less than in criminal, but more than in civil);
Kansas. *State v. Turner,* 217 Kan 574, 538 P2d 966 (1975) (substantial, clear, and convincing);
Kentucky. *"Substantial evidence"*
Nebraska. *Nebraska State Bar v. Cook,* 194 Neb 364, 232 NW2d 120 (1975) (clear preponderance);
Pennsylvania. *In re Shigon*, 462 Pa 329 A2d 235 (1974)("Preponderance of evidence that is clear & convincing").
South Dakota. *In re Jaquin*, 79 SD 677, 117 NW2d 97 (1962)(clear, undoubted preponderance);
Tennessee - "Presumption of correctness";
Utah. *In re McCulough*, 97 Utah 533, 95 P2d

13 (1939)(convincing proof and a fair preponderance);
Vermont. *In re Wright*, 131 Vt 473, 310 A2d 1 (1973)(clear and free from doubt);
Virginia. *Virginia State Bar v. Gunter*, 212 Va 278, 183 Se2d 713 (1971) (clear proof, but not beyond a reasonable doubt);
Washington. *In re Little*, 40 Wash2d 421, 244 P2d 255 (1952)(clear preponderance);
West Virginia. *West Virginia State Bar v. Daniel*, 235 Se2d 369 (WVa 1974) (full preponderating and clear evidence);
Wisconsin. *State v. Heilprin*, 59 Wis2d 312, 207 NW2d 878 (1973)(clear and satisfactory -- the middle burden of proof).

III FAIR PREPONDERANCE

Massachusetts. *In re Mayberry*, 295 Mass 155, 3 NE2d 348 (1936);
Michigan* - court rules
Missouri*
New Mexico* - DeAngelo except for fraud (clear and convincing) what about a more scuring charge than fraud?
New York. *In re Capaccia*, No. 370 (NYCApp, July 7, 1983)(the privilege to practice law is like a property interest and does not require a higher standard of proof);
Texas*

IV BEYOND A REASONABLE DOUBT

Georgia. *Cushway v. State Bar*, 120 GaApp 371, 170 SE2d 732 (1969), *cert denied*, 398 U.S> 910 (1970).

*Survey of National Organization of Bar Counsel